Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OCEANSIDE-MISSION ASSOCIATES,
A California Limited Partnership,

Petitioner,

v.

CITY OF OCEANSIDE, a public body,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Fourth District, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a property owner can lawfully be denied *any* just compensation for the taking of a substantial portion of its land for a State Highway right-of-way on the theory that if development of the land to a higher use were sought, under state law, the owner would have been forced to dedicate the right-of-way without any compensation.

2. Whether in this case, where the undisputed facts are that there was a taking of some 45% of an 18-acre undeveloped parcel of land for right-of-way for a six-lane State Highway, the condemning agency failed to prove that the taking served the same governmental purpose as a development condition requiring the owner upon future development, if it should occur, to contribute reasonably to handling the incremental traffic impact generated by the new development, thus failed to establish the "essential nexus" required by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), resulting, according to *Nollan* in an "out-and-out plan of extortion", in violation of the principles of the United States Constitution.

3. Whether in this case, the condemning agency failed to carry its burden of presenting an "individualized determination that the required dedication [uncompensated taking] is related in both nature and extent to the impact of the proposed development" [if and when it might occur] as required by *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and rather, only presented at best an *ad hoc* oral rebuttal based upon rank (and erroneous) speculation and generalities which fell far short of the standards required by *Dolan*.

4. Whether, given the failure of the condemning agency to establish *either* an "essential nexus" or "rough

QUESTIONS PRESENTED – Continued

proportionality", the action of the trial judge in striking the sum of $856,505 from the jury's verdict on the alleged basis of a probable future dedication condition violated the principles of the United States Constitution, and the stricken sum must be restored to the judgment.

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PETITION FOR A WRIT OF CERTIORARI

Oceanside-Mission Associates respectfully petitions for a Writ of Certiorari to review the Judgment of the California Court of Appeal, Fourth District, Division One, in this case.

OPINIONS BELOW

The unreported Opinion of the California Court of Appeal, Fourth District, Division One, is attached as Appendix A. Petitioner sought rehearing. Rehearing was denied. The Order Denying Rehearing is attached as Appendix B. Petitioner sought review by the California Supreme Court. Review was denied. The Order Denying Review by the California Supreme Court is attached as Appendix C.

JURISDICTION

Review by the highest authority in the State of California was denied on February 2, 2000. The jursidiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor

> shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution.

> Section 1.
>
> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner Oceanside-Mission Associates (hereinafter "Property Owner" or "OMA") owned a parcel of undeveloped commercial land in the City of Oceanside, California. Respondent City of Oceanside, a public entity, acting on behalf of the Department of Transportation of the State of California (hereinafter "Condemning Agency" or "City") sued Property Owner in eminent domain in the Superior Court of San Diego County, California. The City, acting as right-of-way agent for the State of California, sought to take some 45% of Property Owner's land for a right-of-way for a new six-lane state highway, State Route 76.

The case was tried to a jury in San Diego County Superior Court, but after the verdict was returned, the trial judge, contrary to the United States Constitution and the teachings of this Court, struck a substantial portion of

the verdict, improperly reducing the verdict by over $850,000 relying on an alleged condition for forced dedication, and entered a Judgment in a smaller amount.

Property Owner has exhausted all avenues of review at the state level.

PROCEEDINGS BELOW

The Complaint in Eminent Domain was filed on or about January 22, 1996. The City was granted an Order For Immediate Possession effective February 6, 1996.

Over Property Owner's objection, trial was bifurcated with the trial judge deciding the issue of the effect of claimed dedication requirements outside the presence of the jury. After taking testimony, the trial judge ruled that:

> "dedication of a 184-foot-wide strip of land within the property being condemned and amounting to 171,301 square feet [approximately 3.93 acres] of said property is a condition with a reasonable probability of being imposed for approval of development of the larger parcel for commercial use."

[See Appellant's Appendix at p. 457] Hereinafter, all references to the Appellant's Appendix in the California Court of Appeal will be in the form "[Appendix at p. ___]."

Following this ruling made by the trial judge over Property Owner's objections, a jury was empaneled and

valuation testimony taken. The jury returned the following special verdict:

> 1. The fair market value of the property taken is 367,050 square feet [approximately 8.43 acres] times $5.00 per square foot equals $1,835,250. . . . "
> [See Appendix at p. 466]

After the jury was dismissed, over Property Owner's objection, the trial judge preemptively reduced the verdict of just compensation for the part taken by deducting 171,301 square feet (that portion of the right-of-way he erroneously ruled would have had to be dedicated) times $5.00 per square foot, or $856,505 and entered a reduced judgment accordingly. [See Appendix at p. 466]

Hereafter, we will demonstrate that in so doing, the trial judge blatantly violated the constitutional teachings of this Court on forced dedication conditions in land use matters, and the California Court of Appeal and the California Supreme Court allowed this grievous error to stand uncorrected.

NOLLAN-DOLAN PRINCIPLES SLIGHTED BY CALIFORNIA STATE COURTS

Property Owner owned approximately 18.56 acres of undeveloped land zoned for commercial use in the City of Oceanside, in northern San Diego County, California.

The subject property was located some one hundred feet south of existing Mission Avenue, also sometimes called State Route 76, which runs in an east/west direction. For clarity, this roadway in the before condition will

be referred to as "Mission Avenue" and the new State Route 76 project (which is separate from Mission Avenue and at a higher elevation) for which this property was taken will be referred to as "State Route 76" or "the highway."

In this eminent domain case, the northern 8.43 acres of OMA's property was condemned for right-of-way for construction of State Route 76, leaving a remainder of 10.13 acres. The remainder is moderate to steeply sloped with topography which is difficult to develop economically and has questionable access. It was precluded from direct (or even reasonable indirect) access to the new highway by topography and by direct legal restriction to the project plans.

State Route 76 is a limited access, six lane highway, constructed across the subject property atop an earthen berm, thirty to forty feet high. This elevated State Highway did not have an off ramp at or near the subject property nor will it provide direct or even reasonable indirect access to the property. After construction of State Route 76, the remainder of OMA's property is separated from the Mission Avenue commercial corridor below by the earthen berm, which blocks access and view to and from Mission Avenue.

A. Constitutional Limitations on Forced Dedication Conditions.

In order to prevail on the dedication issue in OMA's case, the City had to prove (1) there was an essential nexus between the dedication condition sought to be imposed on OMA and legitimate City goals and (2) if the

essential nexus test was passed, the City then had the burden of proving that there was "rough proportionality" between the exaction imposed and the anticipated impacts to be caused by development of the subject property. These principles were set out by the United States Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

The California Supreme Court has at least given lip service to the federal constitutional principles set out in *Nollan* and *Dolan*. (*Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996)). Unfortunately, in practice, it seems the federal constitutional protections are given little or no heed.

B. Essential Nexus Requirement.

The *Nollan* case involved beach-front property improved with a small bungalow. The Nollans sought to replace the bungalow with a larger house and applied for the required development permit from the California Coastal Commission. The Commission approved the permit, but conditioned that approval upon the Nollans granting to the public an easement along the beach.

This Court held the requirement of the beach-front easement to be a "taking" requiring payment of just compensation. In doing so, this Court discussed the nexus standard. First, this Court acknowledged that the Commission had the right to refuse to issue a permit and that a refusal to issue a permit would not constitute a taking; so a permit condition that served the same legitimate purpose as a refusal would also not constitute a taking. The Court then reasoned:

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. *The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. . . . In short, unless the permit conditions serve the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."*

(*Id.* at 837. Citation omitted. Emphasis added.)

This Court then concluded there was a lack of "nexus" on the facts before it.

C. Essential Nexus Analysis in This Case.

The evidence in OMA's trial established that the need for this new highway is unrelated to any additional burdens placed on City services due to development of the subject property. State Route 76 was required for general city-wide and regional circulation needs in addition to the even broader need of the state highway system to connect Interstate 5 with Interstate 15. This highway was required to serve regional commuters and the general traveling public, not because of development on this specific property. A "cumulative burden" is not good enough per *Nolan, supra.*

The City's purpose of claiming this dedication requirement is not to offset some impact of the development of the subject property but rather to obtain a region-wide benefit to circulation without paying for the right-of-way. It is an old fashioned land grab.

Peter Weiss, City Engineer for the City of Oceanside, testified as to the nexus issue for the City. His duties include the review, evaluation and conditioning of development projects. [R.T. 75:7-19] Mr. Weiss testified that existing Mission Avenue was congested and that development of the subject property would add traffic to Mission Avenue, making the situation worse. Construction of State Route 76 would relieve some of the traffic on Mission Avenue. He contended this was the apparent nexus, or connection, between development of the subject property and the need for a new highway.

Lou Lightfoot, OMA's expert witness, testified regarding the dedication requirements. As the former Planning Director for the City of Oceanside in the 1970's, he oversaw dedication conditions imposed. [R.T. 125:20] Mr. Lightfoot is now a private land use planning consultant with his own business for the last 20 years. [R.T. 125:7-28]

Mr. Lightfoot was retained by Property Owner to determine whether there was a nexus between potential development of the subject property and the need for construction of State Route 76. As part of his investigation, Mr. Lightfoot reviewed the Final Negative Declaration for State Route 76, which set out the reasons this project was required. The purpose of State Route 76 was to link Interstate 5 and Interstate 15. Existing Mission

Avenue served the dual purpose of acting as a state highway for commuters as well as a city surface street. During peak traffic hours the combined commuter and local traffic resulted in congestion. The highway was designed to take through (commuter) traffic off of the local street, creating a true state highway. [R.T. 270-272]

In Mr. Lightfoot's opinion, construction of State Route 76 connecting two interstate highways, I-5 and I-15, is not related to any potential development on the subject property. As of the date of value in this eminent domain case, the subject property was entirely undeveloped, raw land, generating no traffic, yet Mission Avenue was already congested. [R.T. 272:14-28] None of the congestion was the result of traffic generated from the subject property. Even if the subject property were never developed, or used in any way, State Route 76 would still be needed to connect I-5 and I-15 and to relieve existing congestion caused by both the through traffic of commuters and local traffic generated by existing development on other properties. [R.T. 273:1-7]

Plans for State Route 76 had been on record in official public documents since the 1960's. Mr. Lightfoot investigated the evolution of plans for the highway and compared these plans to changes in the land use designation for potential development of the subject property in order to determine whether there was any relationship between the two. Mr. Lightfoot studied the plans for State Route 76 and the City's major street plan, circulation elements and land use designations from 1968 through 1996. [R.T. 274]

Lightfoot determined that from 1968 to present, City planning documents had consistently recognized the need for State Route 76 connecting I-5 and I-15. [R.T. 276:1-3] Lightfoot then compared what type of development was anticipated for the subject property during the same period. [R.T. 276:4-12] He reviewed the Land Use Element of the General Plan for the City of Oceanside through the same time frame starting in 1968 to present. [R.T. 276:4-12] Over these three decades, the City changed its designation for the subject property a number of times from medium density residential, to neighborhood commercial and finally to special commercial highway oriented. *None of the changes to the land use designation for the subject property had any effect on the need for State Route 76, its size, capacity or alignment.* [R.T. 278:11-28]

Mr. Lightfoot's testimony established that the need for this highway is unrelated to any additional burdens placed on City services due to development of the subject property. The highway was needed for general regional purposes in addition to the even broader state-wide need to connect Interstate 5 with Interstate 15. This highway is to serve the general traveling public and the need for it was not generated by development on this specific property. A "cumulative burden" does not satisfy the essential nexus requirement set out in *Nollan*.

The City's purpose in asserting this dedication requirement is not to offset impacts of development of the subject property but rather to obtain a city-wide benefit to circulation without paying for the right-of-way.

Lightfoot concluded that there was no connection or nexus between the need for the highway and any potential development on the subject property. On the contrary, Lightfoot testified that no matter what land use the subject property is designated for, the need for the expressway has remained consistent since 1968. [R.T. 279:1-9]

The City's dedication policy in cases like the Property Owner's is heedless of the Nollan-Dolan principles. If a property owner were unlucky enough to have a circulation element road planned to cross its property, the City would demand a full dedication without compensation, not because its development created the need, but merely because city-wide circulation planning placed a right-of-way in that location.

In Property Owner's case, the City's dedication policy was admitted into evidence and reads in pertinent part:

> The City shall require dedication and improvement of necessary rights-of-way along Master Transportation Plan streets. This usually will occur in fulfillment of a condition of approval for a tentative map. . . .

On behalf of the City, Mr. Weiss testified that the City's dedication policy is that property owners who propose to develop their land are required by the City to dedicate the full right-of-way for all circulation element roads which cross the property. He admitted that the City's dedication requirement is unrelated to the type of development being proposed or the amount of traffic which will be generated by the proposed development. [R.T. 114:2-114] There are no exceptions to the dedication

policy and the dedications are required regardless of the happenstance of geometry and property ownership lines or any site-specific traffic analysis. [R.T. 114:15-115:6] The City's dedication policy was and is flatly oblivious to the federal constitutional requirements of *Nollan* and *Dolan*.

Any unfortunate property owners who seek to develop land which happens to fall within the alignment of major arterial streets must give up land without just compensation, regardless of whether those property owners' developments will generate traffic creating the need for the roadways. Adjacent property owners, on the other hand, may generate tremendous traffic volume but because of the luck of the draw, they would not be required to dedicate the main thoroughfare rights-of-way.

These major circulation element roads are not related to specific developments, but instead are part of the City's master plan for City-wide circulation. This burden should be borne by the City population at large, not disproportionately by the few who suffer the misfortune of owning land that happens to be located where city planners elect to place circulation element roadways.

The facts in *Nollan, supra*, are analogous to Property Owner's situation here, and the constitutional principles enunciated are controlling. As in *Nollan*, here, even if the City of Oceanside denied all development approvals for the subject property, the City would still want State Route 76. Denial of the permits to develop the Nollan property or the OMA property would have no effect on the need for the respective public projects. The goal in both cases was to use the withholding of a development permit to

secure another government objective without paying just compensation for the right-of-way.

D. Rough Proportionality Requirement.

Even if the City had met its burden of showing that there was a nexus or connection between the need for State Route 76 and traffic impacts created by development on the subject property, it was still required to establish that the *amount* of traffic the subject property would add to Mission Avenue was roughly proportional to the exaction sought.

In *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), plaintiff owned a store adjacent to a creek and a portion of the plaintiff's land was within the creek's 100 year flood plain. Plaintiff applied to the City to redevelop the site, doubling of the size of the store and paving a 39-space parking lot.

The City approved Plaintiff's application, but required, as a condition to that approval, dedication of property within the 100 year flood plain for storm drainage purposes and an additional 15 foot wide strip of land for a pedestrian/bicycle pathway.

This Court scrutinized those conditions, noting that "[t]he conditions imposed were not simply a limitation of the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." (*Dolan*, 512 U.S. 374, 114 S. Ct. 2309, 2316 (1994).)

Referring to *Nollan*, this Court then recognized that:

> The government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public benefit – in exchange for discretionary benefit conferred by the government where the property sought had little or no relationship to the benefit.
>
> * * *
>
> In evaluating petitioner's claim, we must first determine whether 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city. *Nollan*, 483 US, at 837, 107 S. Ct., at 3148. *If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.* We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question.

Dolan, 512 U.S. 374, 114 S. Ct. 2309, 2317 (1994); emphasis added.

Applying the *Nollan* test, this Court recognized that prevention of flooding and reduction of traffic congestion are legitimate public purposes and acknowledged a clear nexus between preventing flooding and limiting development within the flood plain. The Court found a nexus between the goal of reduction of traffic congestion and the provision for alternative means of transportation, including a pedestrian/bicycle pathway.

Acknowledging that the nexus test has been met, the Court then dealt with the issue of the required degree of

connection between the condition imposed and the impacts of the projected development. In doing so, this Court developed the "rough proportionality" standard to the requirements of the Fifth Amendment: "No precise mathematical calculation is required, but the city must make some sort of *individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development.*" (*Dolan*, 512 U.S. 374, 114 S. Ct. 2309, 2319-2320 (1994); emphasis added.) Establishing the "rough proportionality" test, this Court placed the burden on the government to justify the required exaction.

In its analysis of the separate bicycle pathway easement, this Court found that the City had not met its burden of demonstrating that the additional trips generated by the new development reasonably related to the required dedication. The finding that the pathway "could" offset some traffic congestion was not sufficient.

E. Rough Proportionality Analysis in This Case.

At trial in this case, the City produced no credible evidence that dedication of a 184 foot wide right-of-way for State Route 76, a six-lane State Highway connecting two major Interstate Highways, I-5 and I-15, was roughly proportional to the increased traffic burden placed on Mission Avenue by potential development of the subject property.

In support of its dedication argument, the City again relied on the testimony of Peter Weiss, who was asked to formulate spontaneously on the witness stand an opinion regarding whether or not a dedication of a portion of the

subject property would have been required as a condition of its development. [R.T. 77:16-21] A summary of his testimony on that issue follows.

When development is proposed, the City evaluates the impacts, including traffic, created by the development and determines appropriate mitigation measures so that any impacts that are created are adequately addressed and do not create additional burdens on the citizens of the City. [R.T. 84:21-28 and 85:4-12]

In evaluating proposed developments, the City considers pre-existing traffic in the area as well as traffic projected to be generated from the specific project. [R.T. 92:17-93-5] The existing condition of Mission Avenue in the neighborhood of OMA's property was already overburdened with traffic congestion. [R.T. 89:1-8] Weiss admitted, however, that none of the existing congestion was caused by the subject property. State Route 76 would relieve congestion on Mission Avenue.

Referring to traffic studies, Weiss argued that development of the subject property could generate as much as 11,000 average daily trips ("ADT's") off the property. [R.T. 94:5-11] The developer would have to provide some sort of mitigation for these impacts. [R.T. 95:1-8] Dedication of a 184 foot wide right-of-way for State Route 76 would be a sufficient mitigation for the impact created by the development. [R.T. 95:9-18] This dedication would have been recommended by the City Engineering Department. [R.T. 97:4-12]

Anticipated traffic volume on State Route 76 is 48,000 ADT's. [R.T. 98:5-9] Weiss suggested (erroneously) an additional 11,000 ADT's from the subject property would

amount to 20 to 24% of that amount. [R.T. 98:10-22] State Route 76 is five miles long. [R.T. 98:10-22] The subject property's 900 foot length is about 2 to 3 percent of the project length. [R.T. 99:20-28]

Weiss opined that dedication of a 184 foot wide right-of-way for State Route 76 is roughly proportional to the impact created by development of the Subject Property. [R.T. 101:1-11] *That impact is the increased traffic added to Mission Avenue* which was already congested without any development of the Subject Property. [R.T. 102:14-18]

There will be no off ramp from new State Route 76 to the subject property. [R.T. 106:14-17] This new highway is constructed across the subject property atop a thirty to forty foot high earthen berm [R.T. 106:18-24]. *Weiss did not testify as to how many cars from the subject property would find their way to Mission Avenue; certainly many would elect other circulation options. Weiss also had no opinion as to how many cars from the subject property would find their way to the new State Route 76,* as opposed to one of many other circulation options. [R.T. 106:6-13]

There was no testimony from Mr. Weiss as to how much of the subject property was suitable for development but he did indicate that "any commercial development of the property would generate and create a significant impact on Mission Avenue, and therefore those impacts would have to be mitigated. That mitigation would be the dedication of a 184 foot wide right-of-way for State Route 76. [R.T. 110:16-111:19] According to Weiss then, even a very small development which added a negligible amount to traffic to city streets would require dedication of one-half the width of the state highway.

Weiss could not say how much traffic would have to be generated from the subject property to warrant dedication of a 184 foot wide right-of-way, nor could he say if even a one acre development would draw the same dedication requirement. [R.T. 111:20-112:28]

The Weiss testimony, even if uncontradicted does not meet the city's burden of proving the *extent* of impact to traffic congestion on Mission Avenue is roughly proportional to a dedication requirement for one-half the width of a state highway, or 184 feet, the full length of the property. Mr. Weiss testified that the impact which justified the dedication was adding traffic to Mission Avenue, which was already congested, yet *Weiss made no effort to perform an individualized study* to determine how much additional traffic would be put onto Mission Avenue by development of the subject property. Likewise, he did not determine how much, if any, of the new traffic generated from the subject property would use the new highway.

This evidence is subject to *de novo* review by this Court for determination of whether, as a matter of law, it supports a finding of rough proportionality. OMA contends it does not, even without conflicting evidence from OMA. There was, however, overwhelming evidence presented by OMA that the dedication sought is grossly disproportional to the minimal traffic impacts to Mission Avenue which can fairly be attributed to development on the subject property.

In contrast to Mr. Weiss, Louis Lightfoot, OMA's municipal planner, performed an individualized determination of how much traffic would be added to Mission Avenue as a result of development of the subject property

in order to determine whether it would be roughly proportional to require the dedication of one-half of the width for the highway in order to offset traffic impacts. Mr. Lightfoot found the potential impacts to Mission Avenue traffic to be insignificant and therefore not roughly proportional to the dedication sought.

In the course of his municipal planning occupation, Mr. Lightfoot often makes determinations of traffic impacts which are likely to result from a specific development. [R.T. 279:20-28] Mr. Lightfoot's rough proportionality analysis follows.

The traffic study relied upon by Mr. Weiss assumed fourteen (14) acres of the subject property would be developed. Mr. Lightfoot concluded, however, that due to condemnation of a portion of the subject property for the highway, only about seven (7) acres of the property would be developable after State Route 76 is constructed. [R.T. 282-283] The City's own engineering witness Philip Buccola, testified that only 7.32 acres of the subject property could be developed after the highway was constructed. [R.T. 939: 23-24] No witnesses from either side, engineers, planner or appraisers, contended that fourteen (14) acres of the subject property could be developed after the highway was constructed. Therefore, Mr. Weiss' assumption that fourteen (14) acres would be developed and generate 11,000 ADT's was unsupported by any facts in the record. In addition to not even attempting to determine how many cars from the subject property would find their way to either Mission Avenue or the new State Highway, Weiss grossly overstated the developable area of the subject property and the total number of ADT's which would be generated.

Mr. Lightfoot began his rough proportionality analysis by reviewing standard traffic generation rates published by the City in its own Thoroughfare Ordinance. Five hundred ADT's per acre of development is the highest rate used by the City. [R.T. 284:8] Multiplying this rate by the seven acres of developable property, results a maximum total of 3,500 ADT's from development of the subject property. Approximately 25% of the trips on and off this commercial property would be from passer-by traffic already on the road, i.e., not new traffic. Therefore, the total amount of traffic actually being added to all city streets as a result of the development of the subject property would be 2,625 ADT's.

Not all of this new traffic, however, would use Mission Avenue. Previous traffic studies for the subject property considered traffic distribution and projected 35% of traffic coming from the property would travel west on Mission Avenue. This would be the greatest point of impact on Mission Avenue. As a result, Lightfoot concluded that if the subject property were fully developed, it would add up to 919 ADT's to Mission Avenue using the highest traffic generation rates possible. [R.T. 284:19] These additional 919 ADT's represent only *1.9%* of the 48,000 ADT capacity for State Route 76, yet the City is demanding dedication of one-half width of the right-of-way. [R.T. 284:19] (and all the California state courts reviewing this matter have directly or implicitly found such forced dedication constitutional).

After estimating traffic impacts from development of the subject property, Mr. Lightfoot compared these impacts to the amount, or width of right-of-way being requested as dedication by the City. Each traffic lane of a

major arterial road such as Mission Avenue carries up to 8,000 ADT's. A private development which increased traffic on the arterial street by approximately 900 cars a day would not be roughly proportional to even require dedication of one additional 12 foot wide travel lane, much less a 184 ft. right-of-way for one-half of a state highway. [R.T. 285]

Mr. Weiss's testimony, even if uncontradicted, does not meet the legal standards required by the rough proportionality analysis. He made no effort to quantify the extent of impacts to traffic congestion on Mission Avenue. Therefore, this Court should review the trial judge's ruling on this issue *de novo*. Even if the substantial evidence standard of review were applicable, however, OMA should prevail on this issue because Mr. Lightfoot was the only witness who estimated the amount of traffic which would actually be added to Mission Avenue and compared to the extent of dedication demanded. Uncontradicted expert testimony on a matter solely within the knowledge of experts is conclusive and cannot be disregarded. (See *Huber, Hunt and Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 313.)

In short, even if it were proper for the trial judge to take the decision away from the jury and rule on the forced dedication condition himself, the decision was incorrect, inconsistent with case law requiring an individualized determination of impacts and the constitutional protection against taking private property for public use without payment of just compensation.

Error is manifest and the reason is plain. The clear federal constitutional principles of Nollan-Dolan were

brazenly ignored by all three levels of the California state courts, as they are ignored by the planning agencies of local government, such as the City of Oceanside as demonstrated above.

FURTHER OVERKILL: IMPROPER VALUATION OF PROPERTY SUBJECT TO THE DEDICATION

The trial judge ruled the dedication condition contended for by the City was constitutional. [See Appendix p. 458] The jury, uninformed of the trial judge's decision, returned a verdict valuing the entire 367,050 square foot area condemned at $5.00 per square foot, or $1,835,250. [See Appendix p. 466] After the jury was released, the trial judge unilaterally (and arbitrarily) reduced the verdict by deducting the 171,301 square feet of property subject to the alleged dedication condition before multiplying by the $5.00 value per square foot. In reducing the verdict by $856,505 the trial judge denied any just compensation at all for 171,301 square feet of private property taken for public use. This land was effectively valued at zero.

Even if one assumes the trial judge was correct in ruling both that OMA did not have a right to a jury trial on the issue of what conditions of development would probably be imposed in the before condition, and that the City had met its burden of proving the conditions it asserted would have been constitutionally permissible [assumptions OMA vigorously rejects], the trial judge incorrectly valued the land he found was subject to dedication.

This issue concerns the application of law to undisputed facts and is therefore subject to *de novo* review.

Under applicable case law, if the City had proved that some portion of the right-of-way would have been subject to a valid dedication requirement, that portion of the right-of-way should have been valued by the jury as agricultural property (existing zoning). (*City of Porterville v. Young*, 195 Cal.App.3d 1260, 1269 (1987); *Fresno v. Cloud*, 26 Cal.App.3d 113, 123 (1972).)

The above cases do *not* stand for the proposition that private property which will be subject to a dedication requirement in the future may be taken without payment of any just compensation at all. The decisions require property which was subject to the dedication requirement be valued as currently zoned. This is consistent with the constitutional requirement that "[p]rivate property may be taken . . . for public use only when just compensation, ascertained by a jury . . . has first been paid. . . ." Article I, Section 19 of the California Constitution.

Therefore, if 171,300 square feet of the property is subject to a valid dedication requirement, in all events, it should be valued at least as agricultural land. Mr. Donahue testified the entire remainder had a highest and best use as for agricultural land in the after condition. [R.T. 862:15-24], valued at $0.50 per square foot. [R.T. 869:22-26] The evidence regarding the value of the subject property for agricultural use was undisputed. Therefore, even if the 171,300 square feet of property was subject to dedication, it should have been valued at $85,650, not zero.

REASONS FOR GRANTING PETITION

1. This case presents yet another example of the apparent unwillingness of the California state courts to embrace the federal constitutional protections mandated by this Court in its seminal cases of *Nollan v. California Coastal Commission, supra,* and *Dolan v. City of Tigard, supra,* and to apply the same objectively and dispassionately (especially without regard to concerns for protection of the "fisc"). Other states of the Union seem not to have a problem to the same degree. See, e.g., *Goss v. City of Little Rock, Arkansas,* 151 F.2d 861 (8th Cir. 1998) ["City's requirement that landowner dedicate to city a portion of property for use as a highway . . . constituted a 'taking' ". 151 F.2d at 861]. With all due respect, the California state courts need to be reminded that objective, even-handed application of the Nollan-Dolan principles is not optional. Rather, the federal constitutional mandates from the highest court in the land – requiring adequate demonstration of both nexus and rough proportionality – are the supreme law of the land.

2. The clean facts and egregious result of this case make it a prime vehicle to strongly reaffirm these constitutional principles and inculcate both the fine points of the required analysis and the necessity for consistent and fair-minded compliance. For example,

- The facts cry out for redress where a property owner is compelled to donate nearly four acres of land without compensation for right-of-way for a six-lane highway it cannot even use;

- failure to prove "essential nexus" is clear;

- failure to prove "rough proportionality" is clear;

- the condemning agency (along with most other local planning agencies in California) is flatly ignoring the Nollan-Dolan principles in its written policies and daily practices;

- redress of the wrong here will not require a retrial, because valuation has already been determined by a jury; all that is necessary is to restore to the judgment the amount the trial judge previously struck from the jury verdict.

CONCLUSION

The California state courts below said it was perfectly acceptable for the government to take nearly 4 acres of OMA's 18 acre parcel for a new state highway without any compensation whatsoever – even though the property cannot get direct access to the new state highway, the project blocks the property from its former access to Mission Avenue, and the property itself did not create any reasonable proportion of the need for the new state highway. The United States Constitution and the opinions of this Honorable Court say resoundingly "No!"

For the reasons set forth above, the Petition for Certiorari must be granted and these grievous errors corrected, and the constitutional protections mandated in *Nollan* and *Dolan* reaffirmed so that other California property owners need not suffer the same fate as OMA by being forced to pay more than their fair share of the

public improvement by judicial fiat in direct contravention of a jury verdict.

DATED: May 2, 2000

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF OCEANSIDE, Plaintiff and Respondent, v. OCEANSIDE-MISSION ASSOCIATES, Defendant and Appellant.	D030661 (Super. Ct. No. N70300-1) (Filed May 9, 1999)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas O. LaVoy, Judge. Affirmed.

This appeal arises from the condemnation by the City of Oceanside (the City) of an eight-acre strip of undeveloped property (hereafter "the take") owned by Oceanside-Mission Associates (OMA), to be used for construction of State Route 76 (SR 76).

In a bifurcated proceeding, the trial court ruled that OMA did not have to be compensated for approximately four acres of the take comprised of a 184-foot-wide strip across the northern portion of the parcel because it was reasonably probable that the City would have required OMA to dedicate this portion of the property as a condition of development. The court also ruled that OMA was

not entitled to precondemnation damages. The jury found that the fair market value of the entire take at its highest and best use (commercial), was $1,835,250, based on 367,050 square feet valued at $5 per square foot. The court then reduced this figure by $856,505 (representing the 171,301 square foot dedication valued at $5 per square foot) to $978,745. The jury also determined that net severance damages based on the loss of commercial value of the remaining parcel were $1,258,705. Thus, the total amount of compensation awarded was $2,237,450.

OMA appeals, contending (1) whether a portion of the take would have been required to be dedicated as a condition of development was an issue for the jury to decide; (2) the court erred in ruling that the dedication was probable and constitutionally permissible; (3) the dedication should have been disregarded as "project influence"; and the court erred in (4) valuing the portion of property subject to dedication "at zero" instead of as agricultural land; (5) reducing the verdict by the value attributable to the dedication; (6) excluding evidence regarding specific development costs; (7) setting the rate of interest; and (8) finding that OMA was not entitled to precondemnation damages.

We reject OMA's contentions for the reasons set forth below, and affirm the judgment.

FACTS AND PRIOR PROCEEDINGS

OMA owned a parcel of approximately 18.56 acres of undeveloped land in Oceanside just south of Mission Avenue. In January 1996, the City initiated proceedings in

eminent domain to acquire an 8.43-acre strip (approximately 330 feet wide and 900 feet long) along the northern portion of this property for the SR 76 expressway. SR 76 is intended to relieve congestion on Mission Avenue and carry commuter traffic from Interstate 5 to Interstate 15.

The parties agreed that in deciding just compensation for the take, the property should be evaluated at its highest and best use, which was commercial. However, the City maintained that as a condition of commercially developing the property, OMA would have been required to dedicate a 184-foot-wide strip (171,301 square feet) across the parcel for SR 76.

Since the 1960s, the City and Caltrans had an "agreement on adopted alignment," which identified a corridor for SR 76 south of, and roughly parallel to, Mission Avenue, and during this period, the City and Caltrans coordinated their efforts to protect this "right-of-way." The City's policy was to require property owners on this corridor to dedicate a 184-foot-wide right-of-way for SR 76 as a condition of developing their properties. Peter Weiss, the City Engineer, testified that based traffic projections for general on a computer model that assigned land use categories (i.e., agricultural, residential, commercial), the City determined that "[SR] 76 is a needed improvement in order to allow full development of this corridor." There were between 38,000 and 43,000 average daily trips on Mission Avenue in the vicinity of OMA's property, which amounted to very congested traffic conditions. In addition, the anticipated volume of SR 76 in the vicinity of OMA's property is 48,000 vehicles a day.

In 1988, OMA submitted an application to the City to rezone its property to "special/commercial." In conjunction with this application, OMA provided two traffic studies addressing projected increases in traffic levels that would result from developing the property as rezoned. These studies indicated that development of a commercial center on the property would generate approximately 11,000 additional daily trips on Mission Avenue. The City approved OMA's application to rezone the property, but added this provision: "Dedication of right-of-way for [SR] 76 shall be provided as necessary through future development application approvals."

Weiss testified that based on the additional number of trips reflected in the traffic studies, there would be a significant impact on traffic circulation in the area if OMA's property were commercially developed. He stated that in order to mitigate this impact, he would recommend dedication of the 184-foot-wide right-of-way, a requirement he opined would be roughly proportional to the impact created.

DISCUSSION

DEDICATION IS AN ISSUE FOR THE COURT TO DECIDE

Property taken in eminent domain proceedings is valued at the highest and most profitable use to which it could be put in the near future. (*City of San Diego v. Neumann* (1993) 6 Ca1.4th 738, 744.) However, where there is a reasonable probability that development of the property at its highest use would be conditioned on a

dedication of a portion of the property taken, this dedication must be accounted for in determining compensation rights. (*City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 297.)

Whether a dedication would be reasonably probable is not only a determination of whether the governmental entity *likely* would have requires the dedication as a condition of development, but whether such requirement would be constitutionally valid. (See *City of Hollister v. McCullough, supra,* 26 Cal.App.4th at p. 298; *Dolan v. City of Tigar* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Comm's* (1987) 483 U.S. 825, 837.) Such determination must be made by the court as part of its responsibility for defining the extent of the property owner's compensable rights. (*City of Hollister v. McCullough, supra,* 26 Cal.App.4th at p. 298; *Sacramento, etc. Drainage Dist.* ex rel. *State Reclamation Bd. v. Reed* (1963) 215 Cal.App.2d 60, 69.) Then the matter goes to the jury to ascertain just compensation for those rights. (Cal. Const., art. I, § 19.) OMA's reliance on *Coachella Valley Water Dist. v. Western Allied Properties, Inc.* (1987) 190 Cal.App.3d 969 is misplaced. At issue there was whether the jury could hear evidence of the " 'before condition' " of the property taken. (*Id.* at p. 977.) The case did not involve a dedication as a condition of development, and the constitutional validity of such a condition was not at issue.

THE COURT'S FINDING THAT THE 184-FOOT-WIDE RIGHT-OF-WAY WOULD HAVE TO BE DEDICATED AS A CONDITION OF DEVELOPMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In order to establish a valid dedication condition, the City needed to demonstrate: (1) it probably would have imposed a dedication requirement as a condition Of OMA's Commercially developing the property (*City of Hollister v. McCullough, supra,* 26 Cal.App.4th at p. 297); and (2) such dedication would be constitutionally permissible – that (a) there is an essential nexus between the dedication and the projected impact caused by the development (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 837); and (b) the dedication is roughly proportional to this impact (*Dolan v. City of Tigard, supra,* 512 U.S. at p. 391). The court's determination regarding a dedication condition is reviewed under the substantial evidence test. (*City of Hollister v. McCullough, supra,* 26 Cal.App.4th at p. 298.) There is little doubt in this case that the City would have required OMA to dedicate the 184-foot-wide right-of-way as a condition of commercially developing the property. The City's policy was to impose this dedication condition on all property owners within the SR 76 corridor, and the City resolution approving OMA's rezoning application indicated that OMA would have to dedicate the right-of-way once it sought approval for a commercial development. The issue is whether such a condition would be constitutionally permissible, and we conclude that substantial evidence supports the court's finding that it would.

Essential Nexus

The essential nexus test articulated in *Nollan v. California Coastal Comm'n, supra,* 483 U.S. at page 837, requires that there be a logical connection between the projected impacts of the development and the dedication imposed as a condition of permitting the development. In *Nollan,* the property owners sought a permit to build a larger house on their beachfront property. As a condition of approving the permit, the California Coastal Commission required them to grant a lateral easement for public access across the beachfront side of their property. The Commission maintained this condition was necessary to foster " 'visual access' " (*id.* at p. 838) to the beach and overcome the " 'psychological barrier' " to its use, because building a larger house would block views of the ocean (*id.* at p. 835). The court concluded there was no link between the permit condition and the Commission's purported purpose for requiring it, finding it "quite impossible to understand" how such an easement furthered visual access or lowered physiological barriers to people *already on the beach.* (*Id.* at p. 838.)

In contrast, here, there is a direct link between the projected traffic impacts of commercially developing OMA's property and the dedication of the right-of-way for SR 76 that the court found would be imposed as a condition of development. OMA's own traffic study indicated that developing the property would add to traffic congestion in the Mission Avenue corridor, and there is substantial evidence that the dedication condition would further the City's purpose in relieving that congestion. (See *Dolan v. City of Tigard, supra,* 512 U.S. at p. 388; *Ehrlich v. City of Culver City* (1996) 12 Ca1.4th 854,

878-879.) This connection is not defeated by the fact that SR 76 is also intended to carry commuter traffic, which should reduce congestion on Mission Avenue as well.

Rough Proportionality

While the essential nexus test involves *whether* there is a connection between the dedication condition and the projected impact of the development, the rough proportionality test examines the *degree* of connection between these two. (*Ehrlich v. City of Culver City, supra,* 12 Cal.4th at pp. 878-879.) The dedication condition need not be directly proportional to the projected impacts of the development, and no precise mathematical calculation is required. (*Dolan v. City of Tigard, supra,* 512 U.S. at pp. 390-391.) However, " . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391.)

We conclude substantial evidence supports the trial court's finding that there is rough proportionality between dedication of the 184-foot-wide strip for SR 76 and the projected traffic impacts of commercially developing the property. Here the City made an individualized determination regarding the impacts of developing OMA's property and the required dedication. When OMA sought to have the property rezoned to special-commercial, the traffic studies it submitted indicated that developing a commercial center on the property would cause an additional 11,000 average daily trips on Mission Avenue in the vicinity of the property. There were between 38,000 and 43,000 average daily trips on Mission

Avenue and an anticipated 48,000 trips on SR 76 in this area. Thus, commercially developing the property would produce at least a 12 percent increase in average daily trips. Weiss testified that the projected increase in traffic was a significant impact that would be mitigated by dedication of a 184-foot-wide right-of-way for SR 76 (a little over half the actual width of the expressway). Weiss also opined that this dedication requirement was roughly proportionate to the projected impacts of developing the property. This is sufficient evidence that the City made individualized findings regarding the nature and extent of the projected impacts of commercially developing OMA's property, and that there is rough proportionality between these impacts and the dedication requirement. (*See Dolan v. City of Tigard, supra,* 512 U.S. at p. 395; *Ehrlich v. City of Culver City, supra,* 12 Ca1.4th at p. 884.)

OMA argues that the actual width and configuration of SR 76 have made its property less commercially desirable, and it will not be able to develop a commercial center that would generate as many average daily trips as indicated in the earlier traffic studies. This argument misses the point. The negative effects of the expressway project on the property's commercial value go to the issue of *severance damages*. Here, OMA was compensated for the loss of value caused by the expressway when the jury awarded it $1,258,705 in severance damages. (See *San Bernadino County Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 902.)

Accordingly, we affirm the trial court's finding that OMA as a would have had to dedicate the 184-foot-wide right-of-way condition of development.

THE DEDICATION SHOULD NOT HAVE BEEN DISREGARDED AS "PROJECT INFLUENCE"

Code of Civil Procedure section 1263.330 provides that in valuing property taken in eminent domain proceedings, any increase or decrease in value caused by the public project for which the property was taken must be disregarded. (All statutory references are to the Code of Civil Procedure.) OMA contends that therefore the dedication of the 184-foot-wide right-of-way must be disregarded because this amounts to a decrease in value caused by SR 76, the project for which the property was taken. This argument is sophistry. Section 1263.330 was enacted to eliminate project influences on market values. (See Cal. Law Revision Com. com., 19A West's Ann. Code Civ. Proc. (1982 ed.) § 1263.330, pp. 61-63.) There is no authority for the proposition that this statute circumvents the right of a city to require a dedication of property that is constitutionally permissible. Indeed, in many cases, the dedication at issue is directly attributable to the public project for which the land is taken. (See e.g., *City and County of San Francisco v. Golden Gate Heights Investments* (1993) 14 Cal.App.4th 1203, 1208; *Contra Costa County Flood Control etc. Dist. v. Lone Tree Investments* (1992) 7 Cal.App.4th 930, 932; *City of Porterville v. Young* (1987) 195 Cal.App.3d 1260, 1266; *City of Fresno v. Cloud* (1972) 26 Cal.App.3d 113, 115-116.)

THE COURT PROPERLY VALUED THE PROPERTY SUBJECT TO DEDICATION

OMA contends the property subject to dedication should have been valued as agricultural property rather than valued at zero, which the court did when it reduced

the verdict after dismissing the jury. We disagree. Dedication is the *uncompensated* transfer of property to a public entity for public use. (*Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463, 1470.) In support of its position, OMA has cited cases in which the entire take was subject to dedication. Under these circumstances, the property was valued at its highest and best use that would not trigger a dedication, which was as agricultural property. (See *Contra Costa County Flood Control etc. Dist. v. Lone Tree Investments, supra,* 7 Cal.App.4th at p. 937; *City of Porterville v. Young, supra,* 195 Cal.App.3d at p. 1269; *City of Fresno v. Cloud, supra,* 26 Cal.App.3d at p. 123.)

Here, however, the property subject to dedication was only a portion of the take. In these circumstances, the take is valued either at its highest and best use (here, commercial), less the full value of the portion that would have been dedicated as a condition of development, or *entirely* as agricultural property, because no dedication would then be triggered. (See *City and County of San Francisco v. Golden Gate Heights Investments, supra,* 14 Cal.App.4th at pp. 1209, 1211.) OMA's position that the dedication should be valued as agricultural property, while the remaining portion is valued as commercial property, is merely an attempt to have its cake and eat it too.

For these same reasons, we also reject OMA's contention the court should have instructed the jury to value the dedication as agricultural property, rather than reducing the verdict by the full commercial value of the dedication.

THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING OMA'S PROFFERED EVIDENCE OF SPECIFIC DEVELOPMENT COSTS

OMA contends the court erred in excluding testimony of its civil engineer, Matthew Webb, regarding specific, line-item costs to develop the property in both its before and after condemnation condition. We disagree.

In condemnation proceedings, the court has considerable discretion in admitting or excluding evidence regarding value. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660.) Here, Webb was allowed to testify regarding the methodology of his cost and feasibility studies of commercially developing the property. Then, using these studies, OMA's appraiser, John Donahue, was able to testify regarding the fair market value of the property before condemnation by comparing it to other commercial parcels that were already developed. Based on the same studies, Donahue also opined that the costs of developing the property in its after condemnation condition so outweighed the benefits that, for purposes of severance damages, the remaining property should be valued as agricultural land. Thus, evidence that development of the property in its before condition was feasible in terms of costs, as well as evidence that development of the property in its after condition was prohibitively expensive, was admitted. The fact that the court excluded evidence of the specific line-item costs of developing the property was well within its discretion. (See *City of Los Angeles v. Frew* (1956) 139 Cal.App.2d 859, 866.)

Finally, OMA complains that the City's appraiser was allowed to put in evidence of the cost of building a

drainage channel on the property when he testified regarding benefits created by the project and their effect on his valuation of the after condition of the property at $2.50 per acre. However, such evidence was properly admissible for purposes of measuring the weight to be given his opinion regarding value. (See *Sacramento etc. Drainage Dist. v. W. P. Roduner Cattle etc. Co.* (1968) 268 Cal.App.2d 199, 207-208; 1 Matteoni and Veit, Condemnation Practice In California (2d ed. 1999) § 5.34, pp. 224.4-224.5.)

THE TRIAL COURT DID NOT ERR IN SETTING THE RATE OF INTEREST ON THE COMPENSATION AWARD

Pursuant to sections 1268.310 and 1268.350, the interest rate on the compensation awarded OMA was set at between 5.56 percent and 5.594 percent for the period of February 1996 to December 1997 when the City had possession of the take prior to judgment. OMA contends the court erred in not setting the rate higher, because the property was encumbered by a first deed of trust securing a note with a 12 percent interest rate. This contention is unavailing.

The judgment incorporates the apportionment rate for eminent domain proceedings set forth in section 1268.350 and quoted by the Department of Transportation. This rate is independent evidence of prevailing market rates of interest upon which the court could rely. (*People* ex rel *Dept. of Transportation v. Diversified Properties Co. III* (1993) 14 Cal.App.4th 429, 451.) The court had discretion to set a higher rate if OMA demonstrated that other current market rates of interest were higher and

more appropriate. (*Ibid.*) However, OMA presented evidence only of its obligation on a note made in the mid-1980's. It presented no evidence regarding market rates of interest from February 1999 to December 1997. Thus it cannot complain that the court used the apportionment rates under section 1268.350.

THE COURT'S DETERMINATION THAT THE CITY WAS NOT LIABLE FOR PRECONDEMNATION DAMAGES IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The condemnee may recover precondemnation damages if it demonstrates that:

> "(1) the public authority acted improperly either by unreasonably relaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (*Klopping v. City of Whittier* (1972) 8 Ca1.3d 39, 52.)

OMA contends the court erred in failing to award precondemnation damages because it presented evidence that (1) the City and Caltrans had plans for SR 76 since the 1960's and the City's policy was to protect the right-of-way for the expressway; (2) for several years there was uncertainty regarding which design would be adopted; and (3) the City offered it only $270,000 to acquire the take, thereby failing to negotiate in good faith and forcing OMA into litigation. OMA's contention is unavailing.

Construction of an expressway is "no small undertaking"; it requires substantial time to plan and necessarily involves many uncertainties and obstacles, including public approval or disapproval, environmental problems and fiscal constraints, before formal condemnation of property may take place. (*Smith v. State of California* (1975) 50 Cal.App.3d 529, 535-536.) The fact that there is inevitable public knowledge regarding a proposed highway project does not entitle the property owner to precondemnation damages. (*Johnson v. State of California* (1979) 90 Cal.App.3d 195, 198-199.).

Here, environmental approval for SR 76 was obtained in 1995, and the City made a formal offer to acquire the take in September 1995. In December 1995, the City adopted a resolution authorizing acquisition of the take by eminent domain, and the complaint in eminent domain was filed on January 1996. There was no unreasonable delay in this case, nor was the uncertainty regarding the design for the project unreasonable. (See *Johnson v. State of California, supra,* 90 Cal.App.3d at p. 199; *Smith v. State of California, supra,* 50 Cal.App.3d at p. 536.) Furthermore, even if we assume that the City's September 1995 offer of $270,000 to acquire the take was unreasonably low, OMA has not shown that such offer caused a diminution in the market value of the property. (See *Klopping v. City of Whittier, supra,* 8 Cal.3d at p. 52.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the City.

/s/ McIntyre
McINTYRE, J.

WE CONCUR:

/s/ Work
WORK, Acting P.J.

/s/ Nares
NARES, J.

APPENDIX B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF OCEANSIDE, Plaintiff and Respondent, v. OCEANSIDE-MISSION ASSOCIATES, Defendant and Appellant.	) D030661)) (Super. Ct. No.) N70300-1))) ORDER DENYING) PETITION FOR) REHEARING)) (Filed Dec. 6, 1999)

THE COURT:

The petition for rehearing is denied.

/s/ Work
WORK, Acting P.J.

Copies to: All parties

APPENDIX C

Fourth Appellate District, Division One, No. D030661
S084511

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

CITY OF OCEANSIDE, Appellant

v.

OCEANSIDE-MISSION ASSOCIATES, Respondent

(Filed Feb. 2, 2000)

Petition for review DENIED.

CHIN
Acting Chief Justice

(2)

Supreme Court, U.S.
FILED
JUN 0 2 2000
CLERK

No. 99-1751

In The

Supreme Court of the United States

OCEANSIDE-MISSION ASSOCIATES,
a California limited partnership,

Petitioner,

v.

CITY OF OCEANSIDE, a public body,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Fourth District, Division One

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

The questions presented by the Petitioner all bear on one issue: Whether under the facts of the case the California state courts properly determined, and then upheld, the dedication requirement. More specifically, Petitioner contends the facts of the case do not support the constitutionality of the dedication requirement under the standards set forth by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Asserted factual error by the state court should not be reviewed by this Court. In any event, the facts of the case support the state court's determination that the dedication was constitutionally valid.

This is not a case where the California state courts have failed or refused to follow the decisions of this Court. The parties agreed that *Nollan* and *Dolan* presented the applicable standard. Both the trial court and the State Court of Appeal applied the tests set forth in these cases in assessing the constitutionality of the dedication. Thus, the California state courts have not decided the matter in a way that conflicts with the decisions of this Court or any other state court.

I.

THE CALIFORNIA COURT OF APPEAL'S RULING DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER APPLICABLE COURT

Rule 10 of this Court sets forth the standards by which the Court will decide whether or not to exercise its discretion to grant review on a writ of certiorari. With

regard to state court rulings, the case must be one in which the state court has decided an important federal question in a way that conflicts with relevant decisions of this Court, or with the decision of another state court of last resort or a United States Court of Appeals. See Rule 10(b) and (c).

In this case the California Court of Appeal did apply the relevant decisions of this Court, i.e., *Nollan* and *Dolan*, in assessing the constitutionality of the dedication. The court's opinion correctly identifies the *Nollan* "essential nexus" test and the *Dolan* "rough proportionality" test as the relevant standards. The opinion references particular facts of the case as they relate to these standards in affirming the trial court's determination that the dedication requirement was constitutionally valid. (See Petition, Appendix A, pages A6-A10.)

Petitioner does not contend the California Court of Appeal's ruling applied the wrong decisions of this Court or incorrectly construed the *Nollan* and *Dolan* standards. Instead, the Petition contends the California courts should have decided the matter differently under the facts of the case. Where, as here, there is no conflict with the relevant decisions of this Court, review should be denied.

As a reason for granting the Petition, Petitioner contends the California state courts have not applied the *Nollan* and *Dolan* standards "objectively and dispassionately." Petitioner compares this case to the court's decision in *Goss v. City of Little Rock, Arkansas*, 151 F.3d 861 (8th Cir. 1998), as a case where the Arkansas court

was more "objective" and "even-handed." (Petition, page 24.) However, there is no conflict between the two cases.

In *Goss*, the United States District Court for the Eastern District of Arkansas determined the City of Little Rock satisfied *Nollan*'s "essential nexus" requirement because the dedication could alleviate problems associated with increased traffic if the property were rezoned as commercial. The Eighth Circuit Court of Appeal affirmed the district court's conclusion was correct. *Id.* at 863. Similarly, here the California Court of Appeal affirmed *Nollan*'s "essential nexus" had been met based on evidence of a direct link between the projected traffic impacts of commercially developing Petitioner's property and the dedication of right of way for the highway as a condition of development. (See Petition, Appendix A, page A7.) Contrary to Petitioner's assertion, *Goss* and the instant case are actually in accord with regard to the *Nollan* standard.

Unlike the instant case, however, in *Goss* the district court found *Dolan*'s standard had not been met. This was based on different facts and evidence. In *Goss*, the district court found that the City of Little Rock did not meet its burden of proving that the dedication was roughly proportionate to the impact that the proposed rezoning would have on traffic. The district court found that Little Rock's assessment was too speculative because it was based on traffic that could "conceivably" be generated in the future. Little Rock presented an opinion without supporting evidence. The district court concluded this failed to comply with *Dolan*'s requirement that the government make an individualized determination that the required dedication is related both in nature and extent to the

impact of the proposed development. *Id.* at 863. By contrast, here the California court specifically concluded that the City of Oceanside made an individualized determination. The court cited Petitioner's own traffic studies prepared when it sought to have the property rezoned commercial. These studies referenced specific volumes of increased traffic which the City used to assess the significance of the impact. (See Petition, Appendix A, pages A8-A9.) The City of Oceanside did what the City of Little Rock did not.

In *Goss*, the City of Little Rock did not dispute the district court's conclusion that it failed to prove rough proportionality. Instead, it contended *Dolan* was irrelevant where it had a legitimate reason for demanding the dedication. *Id.* at 863. The Eighth Circuit correctly rejected this argument. Unlike the City of Little Rock, the City of Oceanside agreed that the *Dolan* standard was necessary to establish the constitutionality of the dedication. The City of Oceanside evidenced rough proportionality.

In summary, the California Court of Appeal's ruling here does not conflict with the decisions of this Court or any other applicable court. Therefore, review should be denied.

II.

THE WRIT SHOULD BE DENIED WHERE THE ASSERTED ERROR CONSISTS OF ERRONEOUS FACTUAL FINDINGS

Rule 10 of this Court states in relevant part:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The asserted error here falls squarely within this "rarely granted" category of the rule. The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991). Reconsidering the factual merits of state court actions is not the Court's function on certiorari.

Perhaps in the most egregious circumstances, this Court will consider asserted erroneous factual findings. For example, where the state court's determination appears on its face to be a sham or a fraud. This is not such a case. The California state courts applied this Court's constitutional standards set forth in *Nollan* and *Dolan* in ruling on the dedication. Specific facts and evidence were presented by Respondent in proving the matter. The specific facts and evidence were cited by the Court of Appeal in its decision.

This case demonstrates that the California courts are properly applying federal law, and not the contrary. There are no issues that warrant this Court's review.

CONCLUSION

Based on the foregoing, Respondent requests that this Court deny the Petition.

Respectfully submitted,

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